

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

TWIN RIVERS UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2014030894

TWIN RIVERS UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2014050203

DECISION

On March 24, 2014, Student, through his Parent, filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, naming Twin Rivers Unified School District (Twin Rivers). The matter was continued for good cause on April 30, 2014. Twin Rivers filed a complaint with OAH on May 5, 2014, naming Parent and Student. On May 21, 2014, OAH granted Twin Rivers' motion to consolidate both cases and identified Student's case as the lead matter governing the timelines for issuing a decision.

Administrative Law Judge Theresa Ravandi heard this matter in McClellan, California, on June 3, 4, 5, and 9, 2014.

Student's Parent and Advocate Joanne Louise represented Student.¹ Student attended the second day of hearing and his younger siblings were present for a short time that day.

¹ The undersigned ALJ subsequently determined in her Order Denying Motion to Dismiss dated July 11, 2014, that Student was entitled to proceed to hearing in his own right because, at the time of hearing, he was a dependent child of the Sacramento County Juvenile Court; the Juvenile Court had limited Parent's education rights on May 16, 2014; and no surrogate had been appointed. (Ed. Code, § 56505, subd. (a).)

Heather M. Edwards, Attorney at Law, represented Twin Rivers. Attorney Michael Tucker attended the first morning of the hearing. Earl Pavao, Twin Rivers' Special Education Coordinator attended each day of hearing, and Dr. Tammy Forrest, Director of Special Education was present the first day as a representative of Twin Rivers.

At the conclusion of the hearing, the matter was continued to June 24, 2014, to afford the parties an opportunity to submit written closing arguments. The record closed with the parties' timely submission of closing arguments and the matter was submitted for decision.

ISSUES

Student's Issues²

1. Did Twin Rivers deny Student a free appropriate public education (FAPE) from March 24, 2012, through the present time, by failing to offer and provide behavior support services?
2. Did Twin Rivers deny Student a FAPE from March 24, 2012, through the present time, by failing to offer and provide kinesthetic training including physical therapy and support for Student's sensory needs?
3. Did Twin Rivers deny Student a FAPE during the 2013-2014 school year by failing to provide any home hospital instruction for a 13-week period during the fall of 2013?

Student's and Twin Rivers' Issue

4. Does Twin Rivers' individualized education program dated February 25, 2014, offer Student a FAPE in the least restrictive environment?

SUMMARY OF DECISION

This Decision finds that Twin Rivers denied Student a FAPE by failing to offer or provide behavior services from March 24, 2012, until its most recent IEP offer of February 25, 2014. However, Student did not prove he had sensory needs and, therefore, Twin Rivers did not deny him a FAPE by not offering and providing sensory supports. Further, Twin Rivers' failure to provide Student with the home instructor of his choice during the fall of 2013, did not result in a denial of FAPE.

² Student's issues as set forth in the Order Following Prehearing Conference have been reorganized and reworded for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

In regards to Twin River's IEP offer of February 25, 2014, this Decision finds that Twin Rivers complied with all procedural requirements in developing the IEP offer, and this offer of specialized academic instruction in a school-based program and related services was reasonably calculated to enable Student to receive educational benefit in the least restrictive environment.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is an 11-year-old boy who resides with Parent, his grandmother, and four siblings within the boundaries of Twin Rivers. Twin Rivers first found Student eligible for special education during his first grade year in December 2009, under the qualifying categories of other health impairment and speech and language impairment. Based on the February 25, 2014 IEP and underlying triennial assessments, he continues to qualify for special education and related services as a student with a specific learning disability.

2. Student attended various Twin Rivers' school sites from the 2008-2009 through 2010-2011 school years. He demonstrated challenging behaviors including work refusal and eloping from the classroom, despite the services of a one-to-one aide, the support of a special day class, a shortened day schedule, and the use of behavior intervention strategies. Parent alleged that Student was injured at three different school sites during this time period. While these allegations form the basis of her opinion that Twin Rivers cannot safely serve Student at one of its schools, the allegations of harm were neither proven nor relevant to the issues for hearing as they do not establish that the current offered placement is unsafe.³

3. Student last attended a school-based program at Allison Elementary School in a special day class, learning handicapped program, through January 2011. Parent rejected Twin Rivers' February 4, 2011 IEP offer of full day instruction in a special day class for students with emotional disturbance at Village Elementary School. At the end of March 2011, during Student's second grade year, Twin Rivers offered Student a program of home hospital instruction, despite its belief that Student required the positive behavior supports and structure of a classroom for students with emotional and behavioral needs.⁴ Through an IEP amendment dated April 5, 2011, Parent and Twin Rivers agreed to a program of home instruction. Twin Rivers has acquiesced to Parent's request that Student remain on home instruction ever since. Student just completed his fifth grade year.

³ Student did not allege any facts to extend the two-year statute of limitations. (20 U.S.C. § 1415(f)(3)(D); Ed. Code, § 56505, subd. (l).)

⁴ The terms "home hospital instruction" and "home instruction" are used interchangeably.

Brief Overview Student's History of Behavioral Needs

4. By the time of Student's February 4, 2011 IEP team meeting, Student's previously discussed challenging behaviors continued, and Twin Rivers identified Student in his IEP as displaying a "complicated pattern of behavior." Student required structure and support to build his skills. At the August 9, 2011 IEP meeting, the team agreed to involve the behavior specialist in Student's IEP team meetings given his complicated social adjustment and behavior. Student would not speak to his home instructor Jennifer Beckett, a special education teacher; he required a reward to complete his work; and he refused to work when frustrated. In order to address his behavior needs, Twin Rivers continued to recommend placement in a small class with positive, proactive behavior support as well as the services of a student support tutor to keep Student safe and on task by providing constant behavior reinforcement and feedback.⁵ Parent disagreed, and Student remained on home instruction.

Student's Behavior Needs, March 24, 2012, through Current Offer of February 25, 2014

MARCH 24, 2012 THROUGH THE 2011-2012 SCHOOL YEAR

5. The statutory period for Student's allegation that Twin Rivers failed to meet his behavior needs reaches back to March 24, 2012. Before this date, Student's IEP team last met on January 9, 2012, and discussed Student's functioning and present levels of performance. Student continued to refuse to speak with his teacher or respond verbally, became frustrated with complex tasks, and had difficulty controlling his emotions resulting in outbursts. The team determined that Student continued to require support and structure. Ms. Beckett utilized communication strategies to help Student share his frustration or to request a break by using a break card. With these strategies, Student's outbursts decreased. Even so, Student's behaviors negatively affected his academic progress. He only partially met all of his academic goals due to his failure to verbally respond.

6. The January 9, 2012 IEP offered 60 minutes of specialized academic instruction, three times per week for a total of 180 minutes in the home, with 30 minutes per month of home speech services. Parent agreed to this offer. Twin Rivers offered speech services so that the speech therapist could build rapport with Student, encourage him to attend a social skills group, and elicit compliant testing behavior in order to develop goals. Twin Rivers' rationale for offering speech services acknowledged Student's behavior needs. Still, the offer failed to include any behavior supports or services. At this IEP team meeting, Twin Rivers and Parent agreed to have Student participate in a social-emotional and

⁵ A student support tutor is a trained one-to-one aide, also referred to at times as a paraprofessional. The term one-to-one aide will be used in this Decision.

functional behavior assessment by a non-public agency due to Parent report that Student was diagnosed with autism.⁶

7. Student's behavioral needs continued through the remainder of the 2011-2012 school year; Twin Rivers was aware of these needs; and Student's needs impeded his learning. Twin Rivers did not convene an IEP team to discuss the results of the nonpublic agency's functional behavior assessment during the remainder of the 2011-2012 school year. Twin Rivers anticipated that this assessment may exceed the typical 60-day timeline due to Student's behaviors and difficulty establishing rapport, and noted this on the January 9, 2012 assessment plan. Therefore, because Twin Rivers knew of Student's behavior needs before the agreement to assess, it was not reasonable for Twin Rivers to await the results prior to offering necessary behavior services. It is unclear when this assessment was completed, although it was available at the time of the August 30, 2012 IEP team meeting discussed below.

8. Twin Rivers assigned general education teacher Don Lawrence as Student's home instructor beginning in March 2012.⁷ He served as Student's home instructor for the remainder of the 2011-2012 school year, through the 2012-2013 school year, and for most of the 2013-2014 school year. Mr. Lawrence was not a credentialed special education teacher and had not received any behavior management training.⁸ Mr. Lawrence's own testimony established he did not consider it his responsibility to address Student's behaviors during home instruction. Rather, he deferred to the grandmother to manage Student's outbursts and rescheduled his sessions when Student acted out or was otherwise non-compliant. Twin Rivers denied Student a FAPE from March 24, 2012, through the 2011-2012 school year by failing to offer or provide any behavior supports or services.

STUDENT'S BEHAVIOR NEEDS DURING THE 2012-2013 SCHOOL YEAR

9. Student's IEP team next met on August 30, 2012, and reviewed his present levels of performance. Student had formed a good rapport with Mr. Lawrence and worked

⁶ Parent refused to share any written diagnoses or medical reports, or sign a release for the exchange of information.

⁷ Mr. Lawrence has been employed with Twin Rivers as a substitute teacher and home hospital instructor since 2001. At the time of hearing, he was providing home instruction to Student pursuant to a non-renewable, short-term staff permit set to expire July 1, 2014.

⁸ Student's April 5, 2011 IEP addendum amended the February 2011 offer of specialized academic instruction in a special day class to home hospital instruction. The team agreed to continue home instruction at an August 9, 2011 IEP meeting. At the January 9, 2012 amendment IEP team meeting, Twin Rivers specifically offered specialized academic home instruction. Whether Twin Rivers was required to provide Student with specialized academic instruction by a credentialed special education teacher in the home setting, and failed to do so, is beyond the scope of this Decision.

hard for him. Although Student had friends, related well with them, and displayed less frequent outbursts, he continued to have difficulty controlling his emotions. Parent and Twin Rivers agreed that Student continued to have needs in the area of behavior. As noted on the special factors page of the August 30, 2012 IEP document, Student's behaviors included shutting down, work refusal, and elopement, all of which impeded his learning.

10. The IEP team revised and agreed upon academic goals and also developed a behavior goal in the area of self-management to be implemented by a special education teacher. Student's behavior goal called for him to utilize a self-management plan which included taking breaks and using pictures to communicate his feelings and increase his ability to control his words or actions and follow directions, with 80 percent accuracy in two of three situations as measured by observation and charting.

11. At the August 30, 2012 IEP team meeting, Twin Rivers again offered specialized academic instruction for 180 minutes per week in the home and speech services. In addition to the behavior goal, Twin Rivers offered the following positive behavior interventions, strategies and supports: introduce new activities slowly, reward participation with a choice activity, and allow short breaks between assignments. The IEP offer was designed to meet Student's unique behavior needs and is found appropriate in that regard.⁹

12. However, Twin Rivers failed to implement its offer of behavior supports.¹⁰ Twin Rivers did not provide Student the services of a special education teacher to support Student in achieving his behavior goal. Mr. Lawrence continued to provide home instruction. Although he used praise with Student, remained calm and consistent, and assisted Student to start over after he tore up his work, there was no evidence that Mr. Lawrence was aware of Student's behavior goal or self-management plan, or that he implemented or was qualified to implement the behavior goal or the identified strategies, or that he charted Student's behavior progress. Mr. Lawrence did not address Student's behavior needs during his home instruction sessions.

13. At the August 30, 2012 IEP meeting, the team also discussed the validity of the behavior assessment completed by Best Consulting, a non-public agency, pursuant to the January 9, 2012 assessment plan. Neither party introduced this assessment report into evidence. Student rejected this report as it was written by a supervisor after the assigned assessor left the agency. Twin Rivers agreed to a further behavior assessment by Sara

⁹ Whether 180 minutes of weekly home instruction by a general education teacher provided Student a FAPE is beyond the scope of this Decision.

¹⁰ Parent signed this IEP but limited her consent to the "comments" which, based on the evidence as a whole, refers to the IEP notes which recorded her agreement to continued home instruction and to the revised goals.

Vicars, a board certified behavior analyst and independent contractor.¹¹ Parent signed a comprehensive assessment plan calling for assessments in all areas including social-emotional functioning and adaptive behavior. Although the IEP team agreed that these assessments were warranted in order to identify effective behavior interventions and necessary services for Student, Twin Rivers remained obligated to serve Student's known behavior needs pending receipt of new assessment results.¹²

14. Near the start of the 2012-2013 school year, Twin Rivers received a statement from Student's pediatrician, Dr. Wayne Wolfrey, in support of home hospital instruction for the 2012-2013 school year. Dr. Wolfrey did not testify.¹³ He listed Student's diagnoses as "Autism, Anger Disorder and Tourettes [sic] Syndrome." Dr. Wolfrey described Student as having frequent anger outbursts and that he needed encouragement to focus and maintain eye contact. Parent refused to sign a release for Student's pediatrician to exchange information with Twin Rivers or to allow Twin Rivers to contact Dr. Wolfrey. Although Student did not prove that he had any of the listed diagnoses or conditions, there was no dispute that he had needs in the area of behavior.

15. Student continued to display challenging behaviors and social-emotional needs throughout the 2012-2013 school year. Twin Rivers was aware of Student's ongoing behaviors and that these behaviors impeded his learning based upon direct observations by its assessors and Mr. Lawrence, and by Parent report.

16. School Psychologist Joseph Cabral conducted a triennial psycho-educational assessment of Student from October 2012 through March 2013.¹⁴ The assessment took an extended period of time as many sessions were not productive due to Student's behavior and non-participation and Student was not readily available. Student did not display any aggressive behaviors, but he would not meet alone with Mr. Cabral; he frequently would not respond or would only whisper responses to his grandmother; and he refused to participate when the tasks became difficult. After Twin Rivers' first assigned speech-language assessor was unable to develop rapport with Student, Kimberly Clark-Fitzbuck was assigned to assess

¹¹ Ms. Vicars has served as a behavior consultant since 2006, and has maintained a private practice since 2010. She has a bachelor's and master's degree in psychology.

¹² As discussed below, Ms. Vicars' functional behavior assessment was not completed until February 2014.

¹³ On June 13, 2013, Dr. Wolfrey completed a nearly identical physician statement in support of home hospital instruction for the 2013-2014 school year. These statements constitute hearsay and cannot on their own support a factual finding. (Cal. Code of Regs., tit. 5, § 3082, subd. (b).)

¹⁴ Mr. Cabral has worked as a school psychologist for the past 12 years. He has a master's degree in school psychology and holds a pupil personnel services credential in school psychology and counseling.

Student's language needs.¹⁵ She observed firsthand Student's aggressive outbursts on two occasions between November 2012 and January 2013. Student overturned furniture, attempted to throw objects, yelled, cursed, and slammed doors resulting in his grandmother restraining him. Throughout her assessment, Student exhibited anxiety and a reluctance to engage verbally, although he warmed up and spoke aloud at the last session. Student was only willing to participate in one standardized assessment, and otherwise refused to engage in testing even if he was only asked to point and respond non-verbally.

17. Mr. Lawrence also observed Student engage in what he termed "pronounced meltdowns" which consisted of out-of-control physically aggressive outbursts. Additionally, during home instruction, Student would become upset and destroy his assignments. Grandmother and Parent informed Twin Rivers of Student's emotional and physical reactivity at home and his destructive behaviors at the doctor's office. Twin Rivers' failure to provide behavior services and supports denied Student a FAPE through the 2012-2013 school year, and was a continuing violation through the next IEP offer of December 11, 2013.¹⁶

STUDENT'S BEHAVIOR NEEDS AT THE DECEMBER 11, 2013 IEP TEAM MEETING

18. Student's IEP team next convened on December 11, 2013. Again, there was no dispute that Student continued to have behavior needs, and the IEP team determined and documented that Student's behavior impeded his learning. The team reviewed Student's present levels of performance. Student's behavior had improved in terms of frequency and intensity of outbursts; he responded well to structure; enjoyed interacting with other children including at his siblings' school; and he was more verbal as his comfort level increased. Still he exhibited social and emotional challenges which impacted his learning, was emotionally and physically reactive when he felt his personal space was invaded, and had significant challenges with anger management in relation to his family.

19. At the December 11, 2013 IEP team meeting, Twin Rivers' assessors presented the results of three assessments completed pursuant to the August 2012 assessment plan: the speech-language assessment completed in February 2013; the psycho-educational

¹⁵ Ms. Clark-Fitzbuck is a licensed speech-language pathologist and has been employed in this capacity for 19 years, first with the former Northern Sacramento School District until it merged to form Twin Rivers. She earned a bachelor's and master's degree in speech-language pathology and audiology, holds a clear, professional rehabilitation credential, and is nationally certified by the American Speech and Hearing Association.

¹⁶ There was no evidence that the IEP team met prior to or at the start of the 2013-2014 school year. Whether Twin Rivers failed to timely provide Student an offer of placement and services for the 2013-2014 school year was not identified as an issue for hearing, and is not decided herein.

assessment completed in March 2013; and the academic testing completed in May 2013.¹⁷ Ms. Vicars began a functional behavior assessment with Student in December 2012 but had not completed it at the time of the December 11, 2013 IEP team meeting, one year later, having only observed Student one time. Parent cancelled assessment sessions, imposed various limits on the assessors, and otherwise did not make Student readily available.¹⁸

20. Student's maladaptive behaviors were present during the assessment process and resulted in some delays. Student refused to meet alone with the assessors, and was reluctant to speak with anyone outside his family, showing signs of selective mutism rooted in social anxiety. Therefore, his grandmother, and at times his Parent and siblings, were present throughout the testing process. Overall, Student did not demonstrate good effort, shut down when tasks became difficult, or simply refused to participate in standardized testing. According to data from social, emotional, and behavior rating scales, Student had deficiencies in the area of adaptive behaviors; demonstrated clinically significant concerns in the areas of aggression, conduct problems, anxiety, learning problems, and externalizing and internalizing problems; and was rated, by a school administrator, as likely and highly likely of having an emotional disturbance.

21. At the December 11, 2013 IEP team meeting, Twin Rivers again offered specialized academic instruction for a total of 180 minutes per week in the home, plus an additional two hours per week home instruction to make up for sessions missed in the fall of 2013. Twin Rivers continued to recommend a functional behavior assessment in order to determine appropriate behavior interventions. Although the IEP team revised academic goals, this time there was no offer of a behavior goal. Twin Rivers recommended updated assessments to include the areas of memory and attention, auditory processing, and autistic-like behaviors. Parent signed an assessment plan on December 11, 2013, which included the areas of academic achievement, health, intellectual development including auditory processing and autism, and social-emotional needs to include a functional behavior assessment.

22. Even if, as Twin Rivers contended, Parent thwarted the timely completion of past agreed-upon assessments, and despite its recommendation for updated assessment data, Twin Rivers had an obligation to serve Student's known behavior needs. At the December 11, 2013 IEP team meeting, Twin Rivers failed to offer any behavior support or services, thereby denying Student a FAPE. This violation continued through the date of the current IEP offer of February 25, 2014, which is analyzed in full below.

¹⁷ Student did not identify as issues for hearing whether or not Twin Rivers timely assessed Student in all suspected areas of need and timely convened IEP team meetings to consider the results of those assessments.

¹⁸ Whether Parent prevented Twin Rivers from timely assessing Student is outside the scope of this Decision.

Student's Alleged Sensory Needs

23. Student does not like to be touched or to have his personal belongings touched. At the January 9, 2012 IEP team meeting, Parent informed Twin Rivers of Student's sensitivities. At the December 11, 2013 IEP meeting, Parent informed the team that Student was emotionally and physically reactive when his sense of personal space was invaded. Student opted to not have any physical contact with Twin Rivers' assessors including high fives or fist bumps.

24. None of Twin Rivers' witnesses, including its assessors and expert Dr. Joseph Whalen, identified Student as having sensory needs.¹⁹ Ms. Vicars did not observe Student to have any sensory challenges, and during her observation of Student at his siblings' class holiday party in December 2013, he did not react negatively when touched. Based upon record review, interviews with involved school staff and family, and direct work with Student, both Ms. Vicars and Mr. Cabral established that Student did not have sensory needs. Dr. Whalen established, based upon his review of Student's records including old IEP's and assessments, Parent correspondence, and the recent assessment data, that Student did not have sensory needs.

25. Student did not introduce any evidence that his issues with personal space, aversion to touch, or reactivity to feeling crowded stemmed from any sensory needs or that sensory services or supports would ameliorate his reactivity. Therefore, Student did not establish that he had sensory needs which Twin Rivers failed to address. Accordingly, Twin Rivers had no obligation to offer or provide sensory services or supports during the relevant statutory period. Student did not prove a denial of FAPE due to Twin Rivers' failure to offer kinesthetic training, physical therapy or sensory supports or services.

Implementation of Home Instruction in Fall 2013

26. Student remained on a program of three hours per week home instruction at the start of the 2013-2014 school year pursuant to the August 30, 2012 IEP. Twin Rivers originally arranged for Ms. Beckett to serve as Student's home instructor, followed by Mr. Lawrence in March of 2012. At the start of the 2013-2014 school year which began August 15, 2013, Mr. Lawrence met twice weekly with Student for a total of three hours a week. By the beginning of September 2013, Twin Rivers discovered that Mr. Lawrence did not have the appropriate credentials to serve as Student's home instructor and informed Mr. Lawrence he was not to provide instruction to Student. Twin Rivers did not provide Student with home instruction services on September 3 and 5, 2013. About this same time, Mr. Pavao offered to

¹⁹ Dr. Whalen has been a licensed clinical psychologist since 1990. He earned a master's degree and doctorate in psychology from the California School of Professional Psychologists. Over his career he has maintained a private practice and has conducted numerous assessments across many settings including various school sites. At hearing he was recognized as an expert in school psychology.

have Ms. Beckett provide home instruction to Student on Parent's preferred days and times.²⁰ Parent refused this offer. Mr. Pavao then offered to have another instructor work with Student after regular school hours. Parent refused this offer as well.

27. Although Parent and Mr. Pavao were not clear on the actual date that Mr. Pavao offered a substitute instructor, both witnesses recalled this happening by either text message or telephone shortly after Mr. Lawrence stopped officially serving as home instructor. Parent's letter to Twin Rivers dated September 6, 2013, established that she had already sent other letters and a text message about resolving the issue of Mr. Lawrence's credentials and her refusal to accept a replacement instructor. Therefore, by no later than September 6, 2013, within approximately one week of learning of Mr. Lawrence's insufficient credentialing, Twin Rivers offered a qualified replacement instructor to provide daytime home instruction to Student. Parent would not accept any home instructor other than Mr. Lawrence. Therefore, Student did not receive home instruction through Twin Rivers for a 13-week period from the first week of September 2013 through November 2013.²¹ Taking into account school holidays, this period constituted 12 instructional weeks, or 36 instructional hours. However, because Twin Rivers offered a qualified substitute instructor, Student did not establish that Twin Rivers failed to materially implement his IEP for this period of time.

28. Twin Rivers attempted to work with human resources to resolve Mr. Lawrence's credentialing status. Mr. Pavao also tried to have Mr. Lawrence certified through a non-public agency in order to continue to serve Student. As of November 19, 2013, Twin Rivers funded a temporary permit authorizing Mr. Lawrence to provide Student with home instruction through the remainder of the 2013-2014 school year.²²

29. Starting in December 2013, Twin Rivers arranged for Mr. Lawrence to resume his home instruction of Student. At the December 11, 2013 IEP team meeting, Twin Rivers

²⁰ Mr. Pavao has served as the special education coordinator since 2008. Previously, he was a school psychologist, a program specialist and a director of special education in one of several school districts that were merged to become Twin Rivers. He has a bachelor's degree in psychology, and a master's degree in counseling and school psychology. He holds a pupil personnel services credential and tier one and two clear administrative credentials.

²¹ Mr. Lawrence voluntarily continued to provide twice weekly home instruction to Student during this period on an unpaid basis, without Twin Rivers' knowledge or authorization.

²² To the extent Student seeks to introduce new information through his closing argument, such as an alleged conversation with the California Commission on Teacher Credentialing, this information is not evidence and was not considered as it was not timely presented at hearing. Further, whether Mr. Lawrence requires a permit to teach Student or if he may renew his permit is not relevant to the issues for hearing.

offered an additional two hours per week of home instruction to make up for missed services. Mr. Lawrence provided Student with five hours per week home instruction from the time of this IEP team meeting through the end of the 2013-2014 school year. Taking into account non-instructional days, by the end of the school year, Student had received approximately 22 weeks of two hours make-up home instruction for a total of 44 hours, which exceeded the 36 hours of instructional time Student missed in the fall of 2013, when Mr. Lawrence was not authorized to serve Student.

30. Student was emotionally upset to learn that Twin Rivers would no longer authorize Mr. Lawrence to provide his home instruction during the fall of 2013. He had formed a positive relationship with Mr. Lawrence and was fearful of losing his teacher. By the time of hearing, with the provision of additional make-up hours, Mr. Lawrence established that Student was back on track in his home instruction program, emotionally and academically. Student's progress supports the determination that Twin Rivers did not fail to materially implement his IEP.

The February 25, 2014 IEP Offer

PROCEDURAL COMPLIANCE

31. This case also concerns the substance of the February 25, 2014 IEP offer and whether it was reasonably calculated to meet Student's unique needs. Student did not contest the procedural validity of this IEP offer. Even so, Twin Rivers established that it developed a procedurally compliant IEP at the February 25, 2014 IEP team meeting as summarized below.

32. Parent received notice of the February 25, 2014 IEP team meeting and attended along with the grandmother, Student, and advocate Ms. Louise.²³ All required school personnel also attended. Twin Rivers provided Parent with a copy of procedural safeguards at the start of the meeting, and she waived a review of her rights.

33. Parent, the grandmother, and advocate actively participated in the meeting and provided their input. Although Parent felt that Twin Rivers had already made its decision to offer a school-based program, she participated in the meeting, asked questions, and disagreed with the offer. Ms. Louise served as an advocate for Parent and expressed Parent's concerns when Parent requested. Although Parent felt misunderstood, Twin Rivers was well aware of, but fundamentally disagreed with, her position that Student could not be safely educated in a school-based program. Even so, Twin Rivers considered Parent's concerns during the meeting. For instance, the team agreed to allow the grandmother to initially attend class with Student to help him acclimate and also agreed to provide specialized training to Student's one-to-one aide as requested by Parent.

²³ Ms. Louise has been an educator for over 40 years and has taught in four school districts. She continues to provide tutoring services.

34. The IEP team reviewed current assessment data, and Twin Rivers provided Parent a copy of each assessment report. The team identified Student's present levels of performance, drafted goals as discussed below, and considered a continuum of program options including general education, resource specialist programs, special day class, nonpublic school, and home hospital instruction. Having considered current data and Parent's input, Twin Rivers developed and provided to Parent, a clear, written offer of placement and services. Parent understood that Twin Rivers was offering immediate placement at its Del Paso Heights Elementary School (Del Paso) in a special day class program for children with emotional disturbance.²⁴

35. The February 25, 2014 IEP offer does not include speech or language services given Ms. Clark-Fitzbuck's assessment that Student did not require such services. At hearing, nearly 16 months after the completion of her report and almost six months after she presented her report to the team, Ms. Clark-Fitzbuck testified that she now recommended 15 to 30 minutes per month of speech consultation services to assist the classroom teacher with strategies to help Student verbalize. Further, once Student began to verbalize, she recommended a new speech and language assessment. Twin Rivers did not withhold information from Parent and members of the IEP team at the time of the December 2013 and February 2014 team meetings. Rather, Ms. Clark-Fitzbuck's opinion changed. Her testimony does not render the offer unclear or otherwise procedurally deficient by preventing meaningful participation.

SUBSTANTIVE COMPLIANCE

IDENTIFICATION OF STUDENT'S NEEDS

36. At the February 25, 2014 IEP meeting, the team reviewed the results of the updated psycho-educational assessment including academic testing and the functional behavior assessment authorized at the December 11, 2013 IEP team meeting.²⁵ As part of his updated assessment, Mr. Cabral interviewed Student and administered an auditory processing measure. This time, he was able to easily establish rapport, and Student willing engaged in

²⁴ The IEP additionally lists home hospital instruction for *three* hours per week beginning February 25, 2014, and ending June 12, 2014. It was uncontroverted that Twin Rivers had already offered and was providing *two* additional hours of home instruction through the 2013-2014 school year to make up for missed sessions. Neither party addressed this ambiguity at hearing. The listing of three hours appears to be a typographically error. The IEP document also confuses the frequency with the duration by mistakenly listing the frequency as "60" and duration as "3." Such errors do not render the IEP procedurally deficient.

²⁵ Whether the assessments met all legal requirements was not identified as an issue for hearing and not decided herein.

the testing process, was cooperative and compliant, and responded verbally. The testing yielded an accurate accounting of Student's skills and deficits.

37. Student demonstrated significant academic deficits upon reassessment in January 2014. On the Woodcock-Johnson Tests of Achievement-Third Edition, Student scored in the borderline range in the area of broad math, and in the deficient range in broad reading and written language. He scored higher in all three areas on this same measure in May 2013, receiving an average standard score in math, though still receiving deficient scores in reading and written language. The evidence established there are many reasons why Student may have scored lower eight months later, unrelated to a loss of skills. Even so, the testing indicated that Student remained significantly delayed and had not progressed. Mr. Lawrence's testimony that Student was now at grade level in math was not persuasive as he did not administer any curriculum-based measures to determine Student's level or progress. There was no competent evidence that Student made more than de minimis academic progress over the course of three years of three hours per week home instruction.

38. As part of his first psycho-educational assessment in late 2012 and early 2013, Mr. Cabral administered the Wide Range Assessment of Memory and Learning-Second Edition to determine Student's cognitive ability.²⁶ Overall, Student's general memory index fell within the borderline range. Student demonstrated a significant discrepancy between his achievement and cognitive ability in the areas of basic reading, reading fluency, reading comprehension and written expression. On the Test of Auditory Processing Skills-3, Student scored in the borderline range on overall auditory processing skills. Student's discrepant scores between his ability and achievement resulted from an auditory processing disorder and rendered him eligible for special education based upon a specific learning disability. The assessment data supported a change in eligibility from other health impaired and speech-language impairment to specific learning disability. Parent did not dispute this change in eligibility.

39. On social-emotional and behavior scales, Parent and Mr. Lawrence each identified only one area to be of clinical significance, adaptability and withdrawal respectively. Given Parent report that Student had been diagnosed with autism and Tourette's syndrome, Mr. Cabral had Parent, the grandmother and Mr. Lawrence complete the Gilliam Autism Rating Scale-2 and the Gilliam Asperger's Disorder Scale. While Parent and grandmother rated Student as being very likely to have autism and possibly to probably having Asperger's Disorder, Mr. Lawrence rated Student as unlikely to have either. The

²⁶ Mr. Cabral's testing was in accord with the *Larry P. v. Riles* (9th Cir. 1984) 793 F.2d 969 injunction which prohibits the use of standardized intelligence quotient tests to determine the cognitive ability of an African American child for the purposes of special education eligibility.

rating scales did not support the existence of significant, pervasive conduct among all raters, which is necessary for a finding that Student has autism pursuant to these assessment tools.²⁷

40. Due to his auditory processing disorder, Student requires additional supports geared towards his strength of visual and hands-on learning. The evidence established that the following supports and strategies would help Student develop his academic skills: restate auditory instructions to confirm understanding; use visual aids to reinforce learning and verbal instruction; encourage note taking; use praise; and provide small group instruction, shorter assignments, and extended time.

41. Ms. Vicars presented the results of her functional behavior assessment at the February 25, 2014 IEP team meeting and also testified at hearing.²⁸ During her assessment, Student demonstrated non-responsive behaviors, but did not display any escalated or aggressive behaviors, nor sensory or elopement issues. The function of Student's non-responsive behaviors was to escape a demand or adverse stimulus. Ms. Vicars did not develop a behavior support plan because Student did not display any escalated behaviors and she did not observe Student in a class setting. Based on this assessment, the following strategies would assist Student in the class setting: building rapport prior to making demands; using visual and auditory supports; providing choices; using a reinforcement system; mixing easy tasks with difficult tasks; using a break space and non-verbal methods to request a break; increasing his school day based upon data; and providing one-to-one support initially.

42. Based on Ms. Vicar's assessment, Student required 120 minutes per month for on-going behavior consultation for the behavior analyst to supervise data collection, review data, modify behavior strategies, and consult with and train Student's teacher and aide. Ms. Vicars also recommended a further functional behavior assessment once Student was in a school-based setting in order to identify behaviors and environmental variables, develop a behavior plan, and train the teacher and aide on data collection and implementation of the plan. This assessment would require an additional 20-30 hours of behavior consultation to collect data, develop a support plan, train and supervise the aide and teacher on data collection and implementation of the plan, review data, and modify the plan as needed.

43. The IEP team identified Student's present levels of performance. Academically, math remained an area of relative strength for Student, although given his challenges in reading, word problems presented a difficulty. Student struggled with auditory processing, decoding, and fluency, and he remained at the first to second grade reading level. He struggled to compose a paragraph and could write only simple sentences. Student was

²⁷ Whether or not Student is on the autism spectrum or qualified for special education as a child with autistic-like behaviors was not at issue and not determined herein.

²⁸ A functional behavior assessment is the systematic collection of behavior data for the purpose of understanding the function of a target behavior and identifying variables which contribute to the behavior, with the goal of developing interventions to decrease the problem behavior and replace it with positive behaviors.

able to communicate his needs and wants, but demonstrated signs of selective mutism and would whisper when uncomfortable. He had no articulation errors, but displayed a limited vocabulary due to his lack of exposure to a full curriculum for several years. Student had no deficits in his fine or gross motor skills. In the area of social-emotional functioning, Student responded well to structure and limits, but struggled with anger management although he displayed fewer and less intense outbursts. In terms of adaptive skills, Student was able to meet his own personal needs and complete his chores. He was in good health and took medication as needed for his asthma.

44. In addition to his academic needs, Student had needs in the area of behavior. The IEP team, including Parent, determined that due to Student's tendency to shut down, refuse to work, and to run, his behavior impeded his learning or that of others.

DEVELOPMENT OF GOALS

45. The IEP team determined Student's current baselines of functioning in his areas of need and developed goals to address his needs and to allow him to progress in the general curriculum. Twin Rivers proposed academic goals in the areas of reading fluency, word problems, writing, and spelling, as well as a coping skills goal to address his behavior needs. These goals addressed all of Student's identified areas of need.²⁹ Parent did not contest the appropriateness of the goals. The IEP called for Twin Rivers to report on the goals each trimester at parent conferences and by way of a progress summary report.

46. All of the goals were based on Student's then-present levels of performance, measurable, and capable of being achieved within a one year period. For example, Student's baseline for his behavior goal was that he became emotionally and physically reactive when he felt his personal space was invaded. This goal called for Student, by December 2014, to demonstrate the correct use of four coping skills such as deep breathing, thought stopping, counting to 10, requesting a break, or calmly verbalizing his feelings, in order to manage his emotions, from three to five times daily as evidenced by teacher or self-report. Two short-term objectives called for Student to demonstrate the above-described use of two coping skills by June 2014, and three skills by November 2014. This goal was measurable, reasonably related to Student's baseline, and achievable within the review period.

OFFERED SERVICES AND SUPPORTS

47. After the IEP team determined Student's unique academic and behavior needs, accurately identified his present levels of performance, and developed measurable, annual

²⁹ The IEP properly identified special day class staff as responsible for implementing Student's coping skills goal. However, the IEP incorrectly identified the home hospital instructor as the person responsible for implementing the reading and writing goal, and failed to identify any responsible person for implementing the math and spelling goals. These errors did not render the goals deficient.

goals, Twin Rivers made an offer of special education and related services. The February 25, 2014 IEP offer is for 325 minutes per day of specialized academic instruction, with a shortened day initially; intensive individual services meaning a fulltime one-to-one trained aide; and 120 minutes per month of behavior intervention services in the form of consultation.³⁰ The special education teacher would provide instruction; the aide would provide direct academic and behavior support and collect data; and the behavior analyst would oversee the collection of behavior data, train classroom staff, and consult with the teacher and aide. Twin Rivers agreed to Parent's request for specialized training for Student's one-to-one aide to include applied behavior analysis³¹ as well as ProAct behavior intervention training.³²

48. In recognition of the fact that Student had not attended a school-based program for three years, the February 25, 2014 IEP offer included a transition plan consisting of a shortened day schedule of three hours for the first 30 days, after which the IEP team would meet to determine the appropriate school schedule for Student based upon data collection. Additionally, Twin Rivers agreed to allow the grandmother to initially attend class with Student. The accommodation of a shortened school day and support from family, along with a small setting and trained-one-to-one support, were designed to increase Student's comfort and facilitate his success prior to increasing demands.

OFFERED PLACEMENT

49. Twin Rivers determined that Student's required services and supports could be delivered in a special day class for students with academic and social-emotional needs and behavior issues, and that this class would also support implementation of his academic and behavior goals. Specifically, Twin Rivers offered placement in the special day class for students with emotional disturbance at Del Paso. Many witnesses testified in support of the suitability of the offered placement including Dr. Whalen who observed the class; Ms. Vicars, Ms. Clark-Fitzbuck, and Mr. Pavao who are familiar with both the class and the teacher; as well as Kristen Wood, who at the time of hearing was teaching the class. Ms. Wood is a special education teacher who holds a clear professional Level-2 teaching credential for students with mild to moderate disabilities.

³⁰ The IEP also offers, as documented in the notes of discussion, a classroom functional behavior assessment which would require parental consent through a signed assessment plan. Parent knew of this component.

³¹ Applied behavior analysis is a data-driven methodology used to effect socially significant behavior change.

³² ProAct is a 14.5 hour professional development training course which focuses on positive behavior management and interventions to prevent crises, as well as de-escalation techniques and safe methods of physical restraint.

50. Since 2001, Ms. Wood has worked extensively with students with behavior challenges who have not been successful in the general education environment. The offered placement is a self-contained classroom located on a public elementary school site.³³ Parent was concerned with the distance to the Del Paso classroom given Student's history of asthma. The placement is located seven and seven-tenths miles from Student's home. There was no evidence as to the length of the drive or how Student's asthma may prohibit him from attending this school. Parent has always transported Student and is not willing to have Twin Rivers assume this responsibility.³⁴ There are no more than 12 students in this class, all of whom have complex social-emotional and behavior needs and academic deficits. Ms. Wood is supported by two class aides. She and her aides completed the ProAct training, and one aide is also trained in applied behavior analysis. Together, they create a predictable, calm environment, and use praise, prompts and redirection with the students.

Class Expectations and Academics

51. Students are under constant supervision, and staff escort them to and from the bus, classroom, cafeteria, playground, and bathroom. Each morning Ms. Wood reviews the daily visual schedule which lists the number of tasks for the day and total possible points that can be earned. Social skills training is imbedded in the daily program. As a group they work on respect for personal space, keeping hands and feet to themselves, and how to step back in response to another's failure to honor the class "no touch" policy.

52. Students participate in English-language arts including reading, writing and spelling each morning with math and science or social studies after lunch. All academics are delivered through small group or one-on-one instruction, which is differentiated for each student based upon learning level and goals. Ms. Wood is experienced teaching students with a specific learning disability and her teaching style is multi-modal and incorporates manipulatives, visual aids, and strategies to check for understanding.

Behavior Reinforcement System

53. Ms. Wood encourages students to take breaks as needed and facilitates the use non-verbal ways to communicate needs when necessary. The class uses a behavior reinforcement system to encourage and reward positive choices. Students maintain a baseline of three points by completing required tasks, and can earn up to five points by handling a challenging situation or doing something extra, or lose points for noncompliance.

³³ Student would receive all of his academic instruction within the classroom. Currently none of the students attend instruction in other classrooms although some receive pull-out speech and language or counseling services.

³⁴ Shortly after the February 25, 2014 IEP team meeting, Parent requested that Twin Rivers reimburse her for gas mileage. As of the time of hearing, Twin Rivers was willing to do so.

Points are exchanged for class money which students use to buy preferred items at the class store. Students also earn goal time and free time with their points, during which they can participate in preferred activities. There is daily communication between the school and home. Ms. Wood prepares daily notes for parents in the form of positive behavior score sheets which rate the student on a scale of zero to five on all required tasks. This informs the family of what behaviors to recognize and praise.

54. Ms. Wood recognized the importance of Student buying into the behavior reinforcement system and the need to ensure there are items of interest or other motivators he wants to earn. Although it is her practice to discourage students from bringing personal belongings from home, she recognized that access to a preferred item may reduce anxiety. If Student has such a need, Ms. Wood would accommodate it by establishing a routine whereby Student could access personal belongings as part of his individualized behavior reinforcement system. Given Student's history of running and reactivity to touch, Mr. Cabral established the importance of using a reward system that Student buys into in order to curb behaviors that would necessitate hands-on intervention. This is a focus of Ms. Wood's class.

55. When students demonstrate challenging behaviors, Ms. Wood and her aides offer choices, provide prompts and reminders of their goals and the reward system, problem solve, and allow time and space. Dr. Whalen observed staff effectively use these strategies. If a student escalates, Ms. Wood removes the other students, so that she and the school psychologist can help the student de-escalate safely. For emergencies only, when a student presents a risk of harm to himself or others, staff are trained and know how to physically restrain a student. If a student leaves class without permission, an aide keeps that student in sight, and uses a portable two-way radio to stay in communication with the teacher and front office. If the student remains in sight, on campus, and safe, the aide simply allows the student to have his space. If the student leaves campus, Twin Rivers' police are notified, as well as the school psychologist and parent. Ms. Vicars established that the most effective strategies to address run-away behaviors are to maintain close proximity and a structured reinforcement system, and to focus on preventing the behavior. Ms. Wood implements these strategies, and Dr. Whalen observed this firsthand when visiting her classroom.

Suitability of the Offered Placement

56. The evidence established that the Del Paso special day class is capable of meeting Student's academic and behavior needs. Small group specialized instruction would address his academic deficits. The small class size, high staff ratio, and one-to-one aide support, would allow staff the opportunity to develop rapport with Student, identify his triggers, and provide effective behavior interventions. Similarly, Student would have the support, structure and incentive to practice his coping skills. Ms. Wood was knowledgeable about Student's goals and demonstrated she was capable of implementing and supporting them. Further she was familiar with Ms. Vicars' and Mr. Cabral's recommended strategies for working with Student and regularly used these strategies in her class. Parent's fear that Student will run away from the class and campus is understandable. However, Twin Rivers

proved that the offered placement is structured to minimize elopement, and the staff are trained to effectively manage such a situation.

LEAST RESTRICTIVE ENVIRONMENT

57. Parent did not contend that Student should be in a general education setting. Even so, Twin Rivers' offer must be evaluated in light of whether a less restrictive setting would be appropriate. Given Student's academic and behavior needs, a general education environment would not be able to serve his level of need at this time. The general education class, with its larger setting, smaller staff to student ratio, and faster pace, would jeopardize Student's transition back to school-based programming after years of home instruction. Further, a large general education class would not assist Student in developing social skills or allow him the time and opportunity to slowly develop his comfort level, a prerequisite for him to verbalize, build rapport and form relationships. In the special day class at Del Paso, Student would have the opportunity to interact and build relationships with general education students during unstructured activities such as recess, lunch, and lunch recess, and during assemblies and field trips. Student would spend 85 percent of the day outside the regular class setting and 15 percent of the day with typical peers during non-academic activities.

58. Parent preferred that Student remain on a program of home instruction with Mr. Lawrence, through the 12th grade.³⁵ She was satisfied with Student's academic and behavioral growth and found home instruction to be a safe program for Student who had not suffered any harm while working with Mr. Lawrence. When Student last attended a class setting, he eloped not only from the class but also from the campus, placing himself at high risk. Parent believed Twin Rivers' staff could not keep Student safe at school and had physically and emotionally harmed him in the past. Mr. Pavao acknowledged that school staff at past placements used ineffective strategies with Student such as increasing demands rather than allowing him a break, or chasing Student when he ran. The qualifications of the personnel currently staffing the offered placement and the structural supports painted a stark contrast between the past and presently offered program. Although Parent asserted that Student required home instruction with Mr. Lawrence to receive a FAPE, the evidence did not support her assertion.

59. To the contrary, the home instruction Student has been receiving is a highly restrictive, limited program option which does not provide Student a full curriculum to address his academic deficits nor afford him opportunities to socialize. Student received little academic benefit from home instruction. In sheltering him from real life situations which trigger his anxieties, home instruction prevents Student from practicing his coping skills and gaining independence. Although Mr. Lawrence believes that Student is not ready for a class setting, he acknowledged that he was not qualified to make such a determination

³⁵ In Student's closing argument, Parent requests home instruction at least through the eighth grade.

and agreed that Student would be best served in a classroom, as that is where Student would learn to deal with others and manage his emotions.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*³⁶

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that may include instruction in the home, physical and occupational therapy and counseling services, that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A) & (B); 34 C.F.R. § 300.320(a); Ed. Code, §§ 56032, 56345, subd. (a).)

³⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Therefore, each party bore their respective burden of proving the essential elements of their claims by a preponderance of the evidence.

Issues 1 and 2: Behavior and Sensory Support Services

5. Student contends that Twin Rivers denied him a FAPE by failing to offer and provide behavior and sensory support services from March 24, 2012, to date. Twin Rivers contends that it was ready to provide Student with all necessary supports and services, but Parent insisted on a program of home instruction. Further, Twin Rivers argues that there was no evidence Student required behavior supports while on home instruction to receive benefit or that Parent ever requested such services, and that Student did not have any distinct sensory needs. Further, beginning in January 2012, Twin Rivers attempted to conduct behavior assessments to determine the most effective interventions, but Parent thwarted those efforts,

resulting in the assessment being delayed and first presented at the February 25, 2014 IEP team meeting.

RELATED SERVICES

6. An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.)

7. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) & (b); Ed. Code, § 56341.1, subd. (b)(1).) It is the intent of the Legislature that children with serious behavioral challenges receive timely and appropriate assessments and positive supports and interventions. (Ed. Code, § 56520, subd. (b)(1).) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029 (*Neosha R-V*); *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

MATERIAL FAILURE TO IMPLEMENT

8. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 820-822 (*Van Duyn*). Only a *material* failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Ibid.*) A brief gap in the delivery of services, for example, may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) [2007 WL 1574569 at p. 7].) "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided." (*Van Duyn, supra*, 502 F.3d at p. 822.)

QUALIFIED PERSONNEL

9. The IDEA requires that special education and related services be provided by qualified personnel. (20 U.S.C. § 1412(a)(14).) The IDEA defines the term "qualified personnel" as personnel who are appropriately and adequately prepared and trained, hold any required certificates or licenses, and who possess the content knowledge and skills to serve children with disabilities. (*Ibid.*; 34 C.F.R. § 300.156(a); Cal. Code Regs., tit. 5, § 3051, subd. (a)(3).)

10. As of March 2012, Student presented with behavior needs which impeded his learning. He made minimal if any academic progress and his refusal, or inability to speak with his teacher due to social anxiety, prevented him from meeting his goals. Twin Rivers was aware of these needs and had an obligation to offer and provide behavior supports. Twin Rivers' failure to offer any supports, services, or qualified personnel to address Student's behavior needs denied Student a FAPE beginning March 24, 2012. This violation continued until the next IEP offer of August 30, 2012.

11. From August 30, 2012, through December 11, 2013, Twin Rivers acknowledged that Student's behaviors impeded his learning and developed a behavior goal to help Student control his words and actions. The August 30, 2012 IEP offer of three hours of specialized academic instruction per week in the home, together with the behavior goal, designed to be supported by a special education teacher, appropriately addressed Student's behavior needs and constituted an offer of a FAPE in that narrow regard. However, Twin Rivers materially failed to implement this offer. It did not provide Student with a special education teacher. Further, even if Mr. Lawrence knew of Student's behavior goal, he did not support Student in meeting this goal, nor was he professionally trained to successfully reduce Student's inappropriate behaviors. The Ninth Circuit has found that the fact that staff were not trained to appropriately address a student's behaviors, and that there was "no cohesive plan in place to meet [student's] behavior needs, supports the ultimate conclusion that [student] was not able to benefit from his education." (*Neosha R-V, supra*, 315 F.3d at 1028-1029.) Twin Rivers' failure to implement Student's behavior goal or provide him with any behavior supports denied Student a FAPE through the time of its next IEP offer in December 2013.

12. At the time of the December 11, 2013 IEP team meeting, there was no dispute that Student continued to have needs in the area of behavior which impeded his learning. However, at the December 11, 2013 IEP team meeting, Twin Rivers failed to offer any supports, services or goals in the area of behavior, and therefore denied Student a FAPE. Twin Rivers' failure to offer behavior services continued until the time of its current offer of February 25, 2014, which is analyzed below.

13. Student met his burden of proof that Twin Rivers failed to offer and provide necessary behavior supports and services from March 24, 2012, through February 25, 2014. Twin Rivers' offer to assess Student's behavior and social-emotional needs did not cure its failure to address his known behavior needs or relieve it of its obligation to offer and provide appropriate interventions based upon the information it had at the time. Student's remedy is addressed in a separate section below.

14. However, Student did not establish that he had sensory needs. Student alleged but did not present competent evidence that his aversion to touch, and his physically and emotionally reactive behaviors to being touched or having his belongings touched, stemmed from sensory needs or that sensory supports or services would ameliorate these behaviors. Accordingly, Student did not meet his burden of proof that he required sensory supports or services to receive a FAPE.

Issue 3: Provision of Home Hospital Instruction in Fall 2013

15. Student contends that Twin Rivers’ denied him a FAPE for a 13-week period in the fall of 2013, when it failed to provide him with home instruction with his preferred provider, Mr. Lawrence. Twin Rivers asserts that once it became aware that Mr. Lawrence did not hold the necessary credentials to teach Student, it immediately offered a qualified replacement instructor who was available to instruct Student on his existing schedule. Twin Rivers contends that it did not fail to implement Student’s IEP but rather Parent refused to accept home instruction from anyone other than Mr. Lawrence. Further, Twin Rivers argues that it provided Student make-up hours from December 2013 through the remainder of the 2013-2014 school year, and therefore did not deny Student a FAPE.

16. Legal Conclusion 8, regarding a material failure to implement an IEP, and Legal Conclusion 9, describing qualified personnel, are hereby incorporated by reference.

NECESSARY COMPONENTS OF AN IEP

17. A school district is not required to include additional information in the student’s IEP beyond what is explicitly required under the IDEA. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. §300.320(d)(1).) For instance, an IEP does not need to specify administrative matters such as class profiles, the identity of particular teachers and service providers, or the qualifications of assigned staff. (*Cerra v. Pawling Central School Dist.* (2nd Cir. 2005) 427 F.3d 186, 194 [class profiles]; 71 Fed.Reg. 46667 (Aug. 14, 2006) [specific providers]; *Letter to Hall* (OSERS1994) 21 IDELR 58 [identity of teacher]; *S.M. v. Hawaii Dept. of Educ.* (D. Haw. 2011) 808 F.Supp.2d 1269, 1274 & 1277 [qualifications].)

18. An IEP need not conform to a parent’s wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an “education designed according to the parent’s desires.”].) A school district has the right to select the service provider so long as the provider is able to meet the student’s needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885 [refusal to assign service providers of parent’s choice does not result in a denial of a FAPE.]; *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) [2007 WL 216323 at p.7] [parents are not entitled to their preferred provider].)

19. Twin Rivers was obligated to provide Student three hours per week of home instruction at the start of the 2013-2014 school year. Student’s IEP did not specify that these services needed to be delivered by Mr. Lawrence for Student to receive educational benefit. Once Twin Rivers learned that Mr. Lawrence was not appropriately credentialed, it arranged for Ms. Beckett, Student’s previous home instructor to work with Student. Twin Rivers failed to provide Student with three hours of home instruction the week of September 2, 2013. By September 6, 2013, Twin Rivers was ready and able to again provide Student with home instruction through an alternate qualified instructor. This brief gap in the delivery of Student’s program did not constitute a material failure to implement his IEP. The law does

not entitle Student to his choice of instructors, and, therefore, Twin Rivers cannot be held accountable for the weeks that Parent refused to allow any instructor other than Mr. Lawrence to work with Student.

Issue 4: Whether the February 25, 2014 IEP Offered Student a FAPE

20. Twin Rivers contends that it complied with all procedural requirements in developing the February 25, 2014 IEP, and crafted a substantively appropriate offer based upon Student's needs as known at the time of the IEP meeting. Twin Rivers asserts that Student is eligible for special education due to a specific learning disability, and its offer of goals, services and placement is reasonably calculated to enable Student to receive educational benefit in the least restrictive environment. Student asserts that he cannot safely attend any classroom offered by Twin Rivers and requires home instruction due to his runaway behaviors, unpredictable escalated behaviors, and aversion to touch. Student contends that the February 25, 2014 IEP placement offer denies him a FAPE because it does not address his unique behavior and safety needs.

PROCEDURAL VIOLATIONS

21. There are two parts to the legal analysis of whether a school district offered a student a FAPE, whether the educational agency has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate, meaning it was "reasonably calculated to enable the child to receive educational benefits." (*Rowley, supra*, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically result in a denial of a FAPE. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

22. A procedural violation of the IDEA results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the Student; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d at p. 1484.)

IEP TEAM COMPOSITION

23. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b).)

MEANINGFUL PARENTAL PARTICIPATION

24. Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).) In this regard, an educational agency must permit a student’s parent “meaningful participation” in the IEP process. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1132; *Target Range, supra*, 960 F.2d at p. 1485.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.*, (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*).) At each IEP team meeting, the district must inform a parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).)

PREDETERMINATION

25. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

CONTINUUM OF PROGRAMS

26. Each special education local plan area shall ensure that a continuum of program options is available for special education students. (34 C.F.R. § 300.115(a); Ed. Code, §56360.) This continuum of program options must include, but is not limited to, instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. (34 C.F.R. §300.115(b)(1); See Ed. Code, § 56361.) A school district is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (See *L.S. v. Newark Unified School District*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) [2006 WL 1390661, p. 6].)

27. Twin Rivers met its burden of proving it complied with the procedural requirements of the IDEA and state law for convening the February 25, 2014 IEP team meeting. Twin Rivers provided Parent with notice of the team meeting, a copy of the procedural safeguards, copies of all assessment reports and the final IEP document. All required team members attended. Twin Rivers included Parent in the decision-making process, and established that it conducted a meaningful IEP meeting with Parent. Since February of 2011, Parent had been engaged in an ongoing debate with Twin Rivers about the propriety of Student’s home program versus a less restrictive school placement. Parent, with the support of her advocate Ms. Louise and the grandmother, meaningfully participated in the decision-making process by asking questions, and expressing her disagreement with

Twin Rivers' offer of placement. The team discussed a variety of program options and there was no evidence of predetermination.

IEP REQUIREMENTS

28. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(1).) An IEP must contain a statement of the child's present levels of academic achievement and functional performance as well as a statement of measurable annual goals designed to meet the child's needs that result from his disability, to enable him to participate and progress in the general education curriculum, and which meet each of the child's other educational needs resulting from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(I) & (II); 34 C.F.R. § 300.320(a)(1) & (2); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

29. One of the procedural prerequisites is that an offer of a FAPE to a student must be specific and be made in writing. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) In the *Union* case, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. A school district cannot escape its obligation to make a formal placement offer on the basis that the parents had previously "expressed unwillingness to accept that placement." (*Ibid.*)

30. The IEP team reviewed available assessment data, and considered Parent's concerns and all appropriate program options. The team was knowledgeable about Student's unique needs and his present levels of functioning. The IEP document addressed all the required elements of an appropriate IEP for Student. Ultimately, Twin Rivers presented Parent with a clear written offer of placement and services. Parent understood, though disagreed, with the offer of a special day class at a public elementary school. Twin Rivers complied with all procedural requirements in developing its February 25, 2014 IEP offer.

EVALUATING THE IEP OFFER

31. To determine whether a school district offered a student a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

32. The Ninth Circuit has held that a district's decisions in writing an IEP cannot be judged exclusively in hindsight, since "an IEP is a snapshot, not a retrospective." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "In striving for appropriateness, an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Id.* at p. 1149, citing *Fuhrmann, supra*, 993 F.2d 1031, 1041 [citing *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.].) However, "after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at 1149].)

33. To be found appropriate under the IDEA, an IEP must not only be procedurally compliant but also substantively appropriate, meaning it was reasonably calculated, at the time it was developed, to enable the student to receive educational benefit.

SUBSTANTIVE COMPLIANCE

34. Starting with the December 11, 2013 IEP team meeting, and continuing to the February 25, 2014 IEP meeting, Student's IEP team reviewed the most current assessment data, accurately identified Student's present levels of functioning and academic performance, and appropriately determined that Student had needs in the areas of academics and behavior. Twin Rivers' assessments supported changing Student's eligibility category to a specific learning disability. The team developed measurable goals in all areas of need. There was no dispute regarding his eligibility, present levels, needs, or goals.

35. Twin Rivers' offer of 325 minutes per day of specialized academic instruction, a fulltime one-to-one aide, and 120 minutes per month of behavior intervention services in the form of consultation, was based upon current assessment data and reasonably calculated to confer educational benefit. Specialized instruction would address Student's academic deficits and severe learning disability in the areas of reading and writing. Twin Rivers recognized Student's need for a transition plan after three years of a limited home instruction program. It appropriately offered Student an initial period of a shortened day schedule and exceeded its legal obligation when it offered the option to have his grandmother accompany him in the classroom. A one-to-one aide would provide intensive support and reinforcement to attend to academics and maintain appropriate behavior, while behavior consultation would assist his teacher and aide to identify his triggers, chart his progress, and support him to reduce and replace challenging behaviors.

36. At the time of the February 25, 2014 IEP team meeting, Twin Rivers did not have any indication that Student had a need for speech services, and its offer must be evaluated in light of information known to the team at the time. Ms. Clark-Fitzbuck's new recommendation at the time of hearing that Student receive 15-30 minutes of classroom speech consultation services and a further speech assessment once he began to verbalize in a class setting, does not render the February 2014 offer deficient. Further, there was no showing that Student would require such services in order to receive educational benefit.

While not ordered, nothing in this Decision prohibits Twin Rivers from convening an IEP team meeting within 30 days of Student's entry into a class setting to address the new recommendation for speech consultation services and further assessment.

37. The center of the dispute was the suitability of the offered educational placement. Twin Rivers' offer of a special day class for students with emotional, behavioral and academic challenges at Del Paso was reasonably calculated to meet Student's academic and behavioral needs. This setting would address Student's academic deficits through small group differentiated instruction so Student could learn at his own level. The small class size and high staff ratio, including a full-time aide would provide Student individual learning time and academic and behavioral support as well as opportunities for socialization and relationship development. There was no evidence that Student could not adjust to a full school day and new routine with the assistance of a trained one-to-one aide, special education teacher, and trained classroom aides.

38. The structured nature of the class, highly trained staff, and the consistency of the behavior reinforcement system would all serve to motivate Student to make good choices, and increase socially appropriate class behaviors, and, should he engage in challenging behaviors, help to maintain his safety. Ms. Wood's teaching strategies, reinforcement system, and methods for addressing challenging behaviors would appropriately support Student and mirrored the recommendations of Mr. Cabral and Ms. Vicars. The February 25, 2014 IEP offer of goals, services, and placement was reasonably calculated to enable Student to receive educational benefit.

LEAST RESTRICTIVE ENVIRONMENT

39. Federal and state laws require local educational agencies to provide a program in the least restrictive environment for each special education student. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114; Ed. Code, § 56040.1.) In order to provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and removal of children with disabilities from the regular education environment occurs only when the nature and the severity of the student's disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2); Educ. Code, § 56040.1.)

40. If it is determined that a child cannot be educated in a general education environment, then the analysis regarding the least restrictive setting requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036,1050.)

41. It was undisputed that Student could not receive educational benefit in a general education class setting. Therefore, in considering whether the Del Paso classroom

was the least restrictive environment for Student, the focus is on whether he would be mainstreamed to the maximum extent appropriate. In order to receive educational benefit, Student requires the specialized small group and individual academic instruction provided in the special day class. Outside of academic time, the offered program provides Student the opportunity to spend 15 percent of the time with typical peers in the regular education setting during unstructured activities. The Del Paso special day class constitutes the least restrictive environment for Student.

42. There was no verifiable evidence that because of his asthma, reactivity to touch, or history of elopement, Student could not receive educational benefit in the offered classroom. Because this Decision determines that Twin Rivers' February 25, 2014 IEP offers Student a FAPE, the adequacy of Parent's preferred program of home instruction need not be analyzed. However, even if it was determined that Twin Rivers' February 2014 IEP did not offer Student a FAPE, a program of home instruction would not meet Student's academic or behavioral needs nor constitute the least restrictive environment.

43. Home hospital instruction is not supported by the record as Parent did not establish that Student had a verified medical, social-emotional, or mental health condition which prevents him from attending a class setting.³⁸ Further, home instruction unduly restricts Student's progress academically, behaviorally and socially, and limits his opportunity to practice verbalizing in an unfamiliar setting. Student made little if any academic progress and did not receive any non-academic benefit in the three years he has been receiving home instruction. Therefore, Student did not establish that Twin Rivers denied him a FAPE by failing to offer continued home hospital instruction.

44. At the February 25, 2014 IEP team meeting, Parent refused transportation services. She subsequently requested reimbursement for mileage should Student attend Del Paso. Based upon testimony at hearing that Twin Rivers would reimburse or otherwise assist Parent with travel expenditures, it is strongly encouraged that the IEP team convene, within 30 days of Student's attendance at school, to discuss transportation options, expenses, and reimbursement.

45. In conclusion, Twin Rivers developed a procedurally compliant IEP at the February 25, 2014 IEP team meeting, and this IEP offers Student a FAPE in the least restrictive environment. Accordingly, Twin Rivers may implement this IEP.

³⁸ When recommending placement for home-hospital instruction, the IEP team must have a medical report from a doctor or psychologist stating the diagnosed condition, certifying that the severity of the condition prevents the pupil from attending school and setting a projected return date. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

REMEDIES

46. Student prevailed on Issue 1. As a remedy, Student requests that Twin Rivers develop and implement a behavior support plan to target Student's aggression and improve his coping skills. Twin Rivers asserts it already offered an additional functional behavior assessment to devise a behavior support plan once Student returns to a class setting.

47. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

48. As determined above, Twin Rivers denied Student a FAPE from March 24, 2012, through February 25, 2014, a period of 68 instructional weeks, when it failed to offer and provide behavior support services. Student is entitled to compensatory education for this denial of a FAPE in the amount of 34 hours (the equivalent of 30 minutes per week for the 68 week period) of both direct behavior services targeting Student's aggressive behaviors and improving his coping skills, and parent training on behavior strategies to support Student's school program. These services are to be provided by a certified nonpublic agency or a certified behaviorist, and are in addition to Student's IEP behavior consultation services and separate from any behavior assessment hours. Up to 20 hours shall be used for training Parent and Student's grandmother on behavior strategies and shall be delivered in the home or at school in the discretion of the provider. The remainder, a minimum of 14 hours and maximum of 34 hours, should Parent and the grandmother be unavailable or unwilling to participate, shall be delivered directly to Student at school. Every effort shall be made to inform and involve Parent so that Student's behavior program can be implemented at home.

49. Twin Rivers shall contract with a nonpublic agency or certified behaviorist for the provision of these compensatory services within 30 days of the date of this Decision. Student shall have access to these services starting no later than 45 days from the date of this Decision and finishing no later than the conclusion of the 2014-2015 extended school year.

ORDER

1. Within 30 days of the date of this Order, Twin Rivers shall contract with a certified nonpublic agency or certified behaviorist to provide Student a bank of 34 hours of

behavior services, to include up to 20 hours of Parent and grandmother training on behavior strategies to support Student at school, and a minimum of 14 hours of direct behavior services for Student at school targeting his aggressive behaviors and improving his coping skills. Every effort shall be made to inform and involve Parent so that Student's behavior program can be implemented in the home. Should Parent and the grandmother be unwilling to participate, the remaining training hours shall be used for direct behavior services for Student.

2. No later than 45 days from the date of this Decision, Student shall be allowed to access the 34 hours of direct behavior services and parent training ordered herein through the conclusion of the 2014-2015 extended school year.

3. The IEP of February 25, 2014, offers Student a FAPE in the least restrictive environment. If Student remains enrolled in Twin Rivers, and returns to school, Twin Rivers may implement the February 25, 2014 IEP.

4. Within five days of the date of this Decision, Twin Rivers shall provide the Juvenile Court with a copy of this Decision to be maintained in Student's Juvenile Court file.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed as to Issue 1. Twin Rivers prevailed as to Issues 2, 3, and 4.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: July 23, 2014

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings